DEC 15

No.

# IN THE SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1980

PUTNAM FABRICATING COMPANY
(a division of Union Boiler
Company), a corporation,
*Petitioner*,
vs.
ROGER NULL, et al.,
*Respondents*.

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

## QUESTION PRESENTED

Are employees who engaged in a work stoppage in violation of the collective bargaining agreement and who acted without the authorization of their union individually liable for damages sustained by their employer arising out of their breach of the collective bargaining agreement?

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**ON WRIT OF CERTIORARI**
**TO THE UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

## PETITION FOR WRIT OF CERTIORARI

Petitioner, Putnam Fabricating Company (a division of Union Boiler Company), a corporation, respectfully prays that a writ of certiorari be issued to review the decision and opinion of the United States Court of Appeals for the Fourth Judicial Circuit entered in this proceeding September 26, 1980.

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*Petitioner was plaintiff in the District Court and Appellant in the Court of Appeals.

**Respondents are former employees of the petitioner and are all members of local union No. 667 of the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers. The following individuals constitute the Defendants in the District Court Action and the Appellees in the Court of Appeals: Roger Null, James Persinger, James McClung, Larry Moore, Joseph Cox, Larry Beller, Steve Shouldis, Harry Flinner, Earl Cunningham, Danny McKean, Robert Cook, Floyd Tillis, Russell Spaulding, Edward Oldham, Aubrey Asbury, Shawn Sayer and Charles Hall.

## OPINIONS BELOW

The opinion of the Fourth Circuit is printed in the appendix at App. A., pp. 1a—5a. Although that decision is not yet published officially, it appears unofficially at 105 LRRM 2645. The order of the United States District Court for the Southern District of West Virginia dismissing the action in response to the defendants' Motion for Judgment on the pleadings and that Court's memorandum opinion are not reported, but are printed in the appendix as App. B. and App. C., pp.6a—10a.

## JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on September 26, 1980. This petition is timely filed within 90 days of that date. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1948).

## STATUTE INVOLVED

This case involves Section 301 of the Labor Management Relations Act, 61 Stat. 156, 29 U.S.C. § 185 (1947), printed in the appendix at App. D., p. 11a, (hereinafter "§ 301").

## STATEMENT OF THE CASE

### 1. Jurisdiction

Putnam Fabricating Company (a division of Union Boiler Company), a corporation, petitioner (hereinafter the "Company"), originally brought this action in the United States District Court for the Southern District of West Virginia against the respondents (hereinafter the "employees") pursuant to § 301. Each of these respondents was a Company employee. The action in the lower Court sought injunctive relief and monetary damages resulting from the employees' unauthorized participation in a "wildcat" strike in violation of the express no-strike provision of the collective bargaining agreement.

**2. Statement of Facts**

The Company and Local Union No. 667 of the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers (hereinafter the "Union"), are parties to a collective bargaining agreement entitled "Agreement of the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers Between Putnam Fabricating Company, Bancroft, West Virginia, and Local No. 667 Charleston, West Virginia." This contract was in full force and effect on June 8, 1977, and at all times material to this case. Article 16 of the contract contains a no-strike provision[1] and Article 25 provides the grievance procedures to be followed by employees for all disputes between the parties.

On June 8, 1977, some of the Company's employees (the respondents herein) who were assigned to the night shift ceased the scheduled work which was in progress that evening, left the plant and refused to return to work. No attempt was made by the employees to submit their grievance to the procedures outlined in the contract. The Union steward on that shift did not instigate, encourage or condone the work stoppage by those employees, nor did he participate with the employees in the picket line which they then initiated at the Company's plant, closing its business. When the employees refused to return to work, they were discharged. The Union officials attempted to disperse the pickets even to the extent of having their attorney talk with them at the picket line. All efforts to dissuade the strikers were to no avail.

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1Art. 16—Cessation of work—lock out:

"Section 1. During the life of this agreement, neither local union No. 667 nor the International Union will authorize or ratify a strike, work slowdown or work stoppage except because of a violation of this agreement by the employer, and then only by a vote of the employees involved in strict compliance with Article XVI of the International Constitution.

Section 2. Any employee entering into an unauthorized or unratified work stoppage will be discharged and not subject to the grievance procedure provided for herein."

**3. Proceedings Below—The District Court**

On June 9, 1977, the Company filed a complaint in the United States District Court for the Southern District of West Virginia requesting injunctive relief and damages against the employees pursuant to § 301 of the LMRA. The Union was not named as a defendant in that complaint. That same day the Company appeared before the district court and requested a temporary restraining order. The motion was granted.

On June 29, 1978, the Company filed its Motion For Summary Judgment. A hearing was held before the district court on July 14, 1978, on that motion and the employees tendered their Motion for Judgment On The Pleadings at that time.

On March 9, 1979, the district court issued its order and memorandum opinion dismissing action with prejudice. In its memorandum opinion the court held that the damage action could not be maintained against the individual employees by the Company under § 301.

**—The Appellate Court**

On appeal, the Court of Appeals for the Fourth Circuit on September 26, 1980, affirmed the judgment of the district court. The appellate court relied upon the holdings of the Sixth Circuit in *Complete Auto Transit, Inc., v. Reis*, 614 F.2d 1110 (6th Cir. 1980), and the Seventh Circuit in *Sinclair Oil Corp. v. Oil, Chemical & Atomic Workers Int'l Union*, 452 F.2d 49 (7th Cir. 1971).

On October 14, 1980, this Court granted a writ of certiorari to the petitioner in *Complete Auto Transit, Inc., v. Reis*, 79—1777.

## REASONS FOR GRANTING THE WRIT

### I. THE ISSUE PRESENTED IN THIS CASE IS EXACTLY THE SAME ISSUE PRESENTED TO THIS COURT IN *COMPLETE AUTO TRANSIT, INC. V. REIS.*

The petitioner in *Complete Auto Transit* was granted a writ of certiorari by this Court on October 14, 1980. In that case, the petitioners presented to this Court exactly the same issue presented in this case. The facts are also quite similar. The petitioner's original action in that case sought injunctive relief as wdll as relief for damages suffered by employers when their employees engaged in an unauthorized work stoppage. The agreement contained both a no-strike provision and a provision which required the submission of all disputes to the grievance procedure.

The district court granted the employees' motion to dismiss and held that the employees could not be sued for monetary relief in their individual capacities under § 301, relying upon the reasoning found in *Sinclair Oil Corp. v. Oil, Chemical and Atomic Workers Int'l. Union, supra.* On appeal, the Court of Appeals for the Sixth Circuit affirmed the judgment of the district court.

Because of the similarity of facts, issues and questions of law presented in the *Complete Auto Transit* case and this case, this court should grant a writ of certiorari to this petitioner as well.

### II. THE DECISIONS OF THE COURTS OF APPEALS MISINTERPRET THE LEGISLATIVE HISTORY OF SECTION 301 WHICH EVIDENCES A CONGRESSIONAL INTENTION TO ALLOW A DAMAGE REMEDY FOR UNAUTHORIZED INDIVIDUAL BREACHES OF A NO-STRIKE PROVISION.

The decision of the Fourth Circuit in this case as well as those of the Seventh Circuit in *Sinclair Oil*, and the Sixth Circuit in *Complete Auto Transit*, do not correctly interpret the Congressional intent in enacting § 301. The circuit courts' holdings stand for the proposition that the legislative

history of § 301 only reflects a desire by Congress to exempt labor union members from their legal and contractual responsibilities. In the committee hearings and in the Senate and House debates which proceeded passage of § 301, the prevalent concern was the legal status of labor unions. Prior to 1947, unions were unincorporated associations and their ability to be held responsible for acts or agreements as associations varied depending on the laws of the state in which they were located.

In those hearings, the references to the "Danbury Hatters" case [*Loewe v. Lawlor*, 208 U.S. 274 (1908)] were made to illustrate the need for a corporate-like status for labor unions. Congress found that union members were being caused to bear personally the responsibility not only for their own individual actions, but also for the collective actions of their labor unions. In passing the Taft-Hartley Act, Congress sought to limit the responsibility for a union's actions to the union's assets in a stockholder/corporate type structure.[2]

Congress clearly insulated the union's membership from liability in § 301(b). However, an examination of the entire bill shows that Congress meant to preserve all remedies already available against unions or individuals depending upon where the blame for strikes belonged.

> "What good is a collective-bargaining agreement if people are not bound by it? If there is a collective-bargaining agreement and the men are bound by it, they ought to carry it out. If the union

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[2]In the senate debates, Senator Taft addressed this issue squarely.

"Mr. President, Title III of the bill, on page 53, makes unions suffer in the Federal Courts for violation of a contract. As a matter of law unions, of course are liable in theory on their contracts today, but as a practical matter it is difficult to sue them. They are not incorporated; they have many members; in some States all the members must be sued; it is difficult to know who is to be sued. *But the pending bill promises they can be sued as if they were corporations* and if a judgment is found against the labor organization, even though it is an unincorporated association, the liability is on the labor union and the labor union funds, and it is not on the individual members of the union, where it has fallen in some famous cases to the great financial distress of the individual members of the labor unions." [emphasis added] 93 Cong.Rec. 3839 (1947).

> wants to carry it out, and some of the men say, 'we will not do it', they ought to be liable. This provision applies only if the action of the individual is a violation of the collective-bargaining agreement." 93 Cong. Rec. at 5706 (1947); remarks of Senator Taft.

Plainly, the language of § 301(a) does not say that only employers and labor organizations may be parties to actions brought under that section. So long as the action alleges a violation of a contract between an employer and a labor organization, the identity of the parties is incidental.

> "An employer is liable for his contracts and should be, and, by the same token, so should the employee." 92 Cong. Rec. at 5942 (1947); remarks of Representative Slaughter.

To read the statutory language of § 301 otherwise is to give the law a one-sided limitation that collective bargaining agreements may be enforced by, but not against, individual employees. To so find is to thwart the Congressional design of promoting industrial peace by providing equal responsibility upon all parties affected by a contract. The passage of the Act evidenced the two desires of Congress: that unions and employees will be held accountable for irresponsible behavior which violates the agreements and that individuals should be held harmless for the activities authorized by their unions.

## III. THE ISSUE PRESENTED IN THIS CASE HAS NEVER BEEN ADDRESSED BY THIS COURT.

This Court has never decided a case of like facts, but did specifically reserve the instant question in *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962), at 249, fn. 7.[3] A survey of the leading cases decided by this Court under § 301 shows that the Act has been broadly applied in the enforcement of collective bargaining agreements, and proves that the judicial policy established in *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448

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[3][W]e therefore do not reach the question of whether the count would state a proper §301 (a) claim if it charged unauthorized, individual action.

(1957), of promulgating a common law relating to labor questions is a viable approach. In the *Lincoln Mills* case, this Court held that a narrow reading of § 301 would defeat the express objective of the Act of reducing the large number of strikes in this Country, and redressing a bargaining-power imbalance in favor of the unions which was seen to have been created by the National Labor Relations Act. That conclusion was rendered after an in-depth study of the Congressional Record found in the opinion's sixty-one page appendix.

Based upon the *Lincoln Mills* rationale, it is incumbent upon the federal courts to fashion a remedy that will effectuate the policy of creating sanctions where the statutes are found lacking in express language. "The range of judicial inventiveness will be determined by the nature of the problem." 353 U.S. at 457.

After *Lincoln Mills*, this Court has never hesitated to apply § 301 to allow suits by employees against their employers, even though the express statutory language does not grant that jurisdiction.[4] In *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970), this Court recognized an employer's right to enjoin unions' strike actions which violate a no-strike provision, thus adding a broader interpretation which was an exception to the Norris-LaGuardia Act.[5]

The next logical step to be taken, and the path which the petitioner urges for the Court, is the continuation of broad and even-handed enforcement of § 301 by holding that individuals must also be bound by their agreement and held liable to their employer for the damages which result from their irresponsible and unauthorized breaches of a contract.

This result is clearly necessitated in light of this Court's decision in *Carbon Fuel Company v. United Mine Workers of America*, —U.S.—, 100 S. Ct. 410 (1979). In that case, the unions successfully argued that a union can be held liable

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[4]*Smith v. Evening News Association*, 371 U.S. 195 (1962); *Vaca v. Sipes*, 386 U.S. 171 (1967); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).

[5]29 U.S.C §§ 101—15 (1932).

for the damages resulting to employers from wildcat strikes only when it can be found to be responsible for that strike under a showing of "legal proof of Agency," 100 S. Ct. at 413. In the instant case, the legal proof of agency is absent. Here the Union went to extremes not normally taken to attempt to dissuade its members from picketing their employer's business. Therefore, it is obvious that the individuals proceeded with their activities in total disregard of the provisions of the contract, the demands of their Union and employer to the contrary notwithstanding.

## IV. THE PUBLIC INTEREST OF UNINTERRUPTED INDUSTRIAL OPERATION DURING THE TERMS OF CONTRACTS WOULD BEST BE SERVED BY FASHIONING A DAMAGE REMEDY FOR EMPLOYERS.

Employees derive benefit from contracts in the obvious form of wages, hours and working conditions to which they must agree before ratification of the agreement. In addition, they receive the due process protection afforded by the grievance machinery of the agreement. As a quid pro quo, they agree not to engage in unauthorized work stoppages during the term of the agreement. Thus, the employer receives the benefit of the promise of uninterrupted production time. During the agreement, a company has the right to expect that there will be **no** unexpected and costly strikes. When individual employees strike with impunity, the employer loses valuable production time and profits. More importantly, however, the bargaining process is undermined.

The enactment of § 301 gave to employers hope of a practical vehicle to enforce their contracts, but the subsequent interpretation placed upon that section by three of the circuit courts of appeals returns employers to their pre-Taft-Hartley status. The employees receive the benefits of the bargain, but are placed under no legal obligation to honor the contract. The promise not to strike in any contract is of no value unless it is binding upon the parties—the

employees themselves—who can physically man a picket line.

The realization by employees that their individual breaches of a contract may give rise to individual damage suits would deter them from striking without union authorization, encourage the national labor policy of encouraging peaceful settlement of labor disputes, and thus promote the public's interest in nationwide industrial peace during the term of a collective bargaining agreement.

Allowing employees to disregard the clear language of contracts prohibiting strikes and exempting them from suits brought for damages eviscerates the contractual agreement and renders it an anomaly. Calling employees to task for their contractual duties will "promote a high degree of responsibility upon the parties to such agreements and will thereby promote industrial peace." S. Rep. No. 105, 80th Cong., 1st Sess., p. 17 (1947). A solution is badly needed in view of the continued use by individuals of the wildcat strike to modify contracts after ratification.

## CONCLUSION

For the above-stated reasons, the petitioner respectfully requests this court to issue a Writ of Certiorari.

Respectfully submitted,

PUTNAM FABRICATING COMPANY
(a division of Union Boiler Company)

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**APPENDIX A**

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

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**No. 79—1275**

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PUTNAM FABRICATING COMPANY,
*Appellant.*

vs.

ROGER NULL, JAMES PERSINGER,
JAMES McCLUNG, LARRY MOORE,
JOSEPH COX, LARRY BELLER,
STEVE SHOULDIS, HARRY FLINNER,
EARL CUNNINGHAM, DANNY McKEAN,
ROBERT COOK, FLOYD TILLIS,
RUSSELL SPAULDING, EDWARD OLDHAM,
AUBREY ASBURY, SHAWN SAYER,
CHARLES HALL,
*Appellees.*

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Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Dennis R. Knapp, Chief Judge.

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Argued: August 12, 1980 Decided: September 26, 1980

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Before FIELD, Senior Circuit Judge, and HALL and SPROUSE, Circuit Judges.

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Sarah E. Smith, Ricklin Brown (Bowles, McDavid, Graff and Love on brief) for Appellant; James M. Haviland (James B. McIntyre, McIntyre, Haviland & Jordan on brief) for Appellees.

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FIELD, Senior Circuit Judge:

Presented for our determination in this case is the question whether an employer, pursuant to Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185,[1] may recover damages from individual union members for an unauthorized and unratified breach of the no-strike provision of a collective bargaining agreement. On June 8, 1977, the seventeen defendants, all members of Local Union 687, International Brotherhood of Boilermakers, Iron Ship

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[1]29 U.S.C. § 185 reads, in pertinent part, as follows:

§ 185. *Suits by and against labor organizations*
*Venue, amount, and citizenship*

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

*Responsibility for acts of agent;*
*entity for purposes of suit;*
*enforcement of money judgments*

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

* * * *

*Determination of question of agency*

(e) For the purpose of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Builders, Blacksmiths, Forgers and Helpers (Union) and employees of Putnam Fabricating Company (Company), walked off the job in violation of the no-strike provision of the collective bargaining agreement between the Company and the Union. Since the work stoppage was neither authorized nor ratified by the Union, the defendants were discharged by the Company pursuant to the collective bargaining agreement.[2] Thereafter, a picket line was set up and the Company was shut down. In response, the Company filed suit in the district court against the employees, seeking both injunctive relief and damages. The district court issued a temporary restraining order but subsequently denied the Company's motion for a preliminary injunction. In addition, the court dismissed the Company's claim for damages and from this latter order the Company appeals. We affirm.

Although the question presented is one of first impression for us, both the Seventh and Sixth Circuits have had occasion to consider the issue.[3] In *Sinclair Oil Corp. v. Oil, Chemical and Atomic Workers International Union*, 452 F.2d 49 (7 Cir. 1971), the employer sought damages under Section 301 from individual employees who, in defiance of their union, refused to cross a picket line maintained by fellow union members of another bargaining unit. In dismissing the employer's claim, the Seventh Circuit looked to both the language and legislative history of Section 301. The court noted that Section 301(b) expressly prohibits enforcement against individual union members of judgments obtained against the union and that:

> [t]he legislative history of the Act indicates that the principal concern of Congress was with making unions, as parties to collective bargaining agreements, responsible for breaches of agreements and to avoid subjecting individual union members to fiscal ruin

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[2]It is undisputed that the Union is without liability in regard to the work stoppage.

[3]This issue was expressly reserved by the Supreme Court in *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 249, n.7 (1962).

> that was visited upon members as a result of the "Danbury Hatters" decision.[4]

452. F.2d at 52. Further, the court pointed out that the employer is not without remedy for it may discharge or discipline the individual union members who violate the collective bargaining agreement. The court concluded, therefore, that "when Section 301 was enacted [Congress] had no intention of subjecting union members engaged in wildcat strikes to individual liability for damages." 452 F.2d at 54.

The same conclusion was reached by the Sixth Circuit in *Complete Auto Transit, Inc. v. Reis*, 614 F.2d 1110 (6 Cir. 1980). In *Reis* the employer sought damages from individual employees who had gone on strike claiming their union was not representing them properly in current negotiations. Agreeing with the Seventh Circuit, the court concluded that there is no indication that Congress intended to create a cause of action for damages against individual union members for breach of a no-strike agreement. 614 F.2d at 1116.

We, too, find the Seventh Circuit's analysis in *Sinclair Oil* persuasive. In passing Section 301(b) Congress was obviously concerned with the "fiscal ruin visited upon [union] members as a result of the "Danbury Hatters" decision." *Sinclair Oil v. Oil, Chemical and Atomic Workers Union*, 452 F.2d 40, 52 (7 Cir. 1971). [sic] In the light of such Congressional concern, it would be anomalous to extend Section 301 to permit damage suits by employers against individual union members for breaches of a collective bargaining agreement.[5] There is simply no authority in the

[4]In the "Danbury Hatters" decision (*Loewe v. Lawlor*, 208 U.S. 274 (1907); *Lawlor v. Loewe*, 235 U.S. 522 (1915); *Loewe v. Bank of Danbury*, 236 F. 444 (2 Cir. 1916)), a large money judgment was entered against several union members individually in an antitrust action and their personal assets were used to satisfy the judgment resulting in financial ruin for many.

[5]As noted in Sinclair Oil, 452 F.2d at 52, Congress was apparently interested in making unions responsible for breaches of collective bargaining agreements. For example, Section 301(b) mandates that unions will be bound by the acts of their agents and under Section 301(e) in determining whether a person is acting as an "agent" the question of whether the specific acts performed were actually authorized or subsequently ratified is not controlling. This is somewhat indicative that Congress was trying to insulate the individual union members and hold the union responsible.

legislative history for a contrary conclusion. Finally, we are influenced by the fact that in some nine years since the Seventh Circuit decided *Sinclair Oil*, Congress has not seen fit to take any action to alter the result in that case. Accordingly, we hold that Section 301 does not create a cause of action for damages by an employer against individual union members for such an unauthorized breach of the collective bargaining agreement.[6]

**AFFIRMED**

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[6]We recognize that some district courts have reached a contrary conclusion. *E.g. New York State United Teachers v. Thompson*, 459 F. Supp. 677 (N.D. N.Y. 1978); *Alloy Cast Steel Corp. v. United Steel Workers*, 429 F. Supp. 445 (N.D. Ohio 1977). However, we do not find them persuasive. *See Complete Auto Transit, Inc. v. Reis*, 614 F.2d 1110, 1115—16 (6 Cir. 1980).

## APPENDIX B

## UNITED STATES DISTRICT COURT
## SOUTHERN DISTRICT OF WEST VIRGINIA
## CHARLESTON

PUTNAM FABRICATING COMPANY,
*Plaintiff,*
vs. Civil Action No. 77-2277-CH,
ROGER NULL, et als.,
*Defendants.*

### ORDER

This action came on for hearing before the Court and the issues having been duly heard and a decision having been duly rendered in accordance with this Court's Memorandum Opinion of even date herewith, which is ORDERED filed and made a part of the record herein, it is ORDERED and ADJUDGED that this action be, and the same is, hereby dismissed with prejudice and stricken from the docket of this Court.

The Clerk is directed to mail certified copies of this Order and the Court's Memorandum Opinion to counsel of record herein.

ENTER: March 9, 1979
DENNIS R. KNAPP, Chief
United States District Judge

## APPENDIX C

## UNITED STATES DISTRICT COURT
## OF WEST VIRGINIA SOUTHERN DISTRICT
## CHARLESTON

PUTNAM FABRICATING COMPANY,
*Plaintiff,*
vs. Civil Action No. 77-2277-CH,
ROGER NULL, et als.,
*Defendants.*

## MEMORANDUM OPINION

The issue in this case is whether an employer may maintain an action for damages under the provisions of Section 301 of the Labor-Management Relations Act,[1] 29 U.S.C. §185, solely against employee union members where such employees engaged in an unauthorized strike which resulted in work stoppages at the employer's plant.

On June 8, 1977, defendants, then employees of plaintiff and members of Local Union No. 667, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, walked off the job at plaintiff's plant in Bancroft, West Virginia. Plaintiff demanded that defendants return to work but each refused. The parties agree that Local No. 667 neither authorized nor ratified the walkout.

Article 16 of the Collective Bargaining Agreement between the union and plaintiff authorizes discharge of any employee entering into a work stoppage unauthorized or unratified by the union. Pursuant to those provisions, plaintiff exercised that right and discharged all of the defendants. A picket line was then formed, which resulted in the closing of plaintiff's plant, causing economic loss to the plaintiff. This action followed.

Section 301(b) of the Labor-Management Relations Act reads in pertinent part:

> ". . . any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

Plaintiff contends that an individual employee is insulated from personal liability only in a case where an action is brought against both the employee and his union, *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962), or against an employee where his union was at least arguably liable. *Williams v. Pacific Maritime Assoc.*, 421 F.2d 1287

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[1]Often referred to as the "Taft-Hartley Act."

(9th Cir. 1970). Plaintiff therefore contends that Section 301(b) furnishes the substantive vehicle which allows a cause of action for damages to be maintained against an employee under the circumstances hereinbefore set forth.

It is axiomatic that Section 301(b) should be read in a way so as not to defeat its Congressional aim. See, *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

> "The Labor-Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. *Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy.* The range of judicial inventiveness will be determined by the nature of the problem. [Emphasis supplied]. 353 U.S. at 457.

It is without question that the instant cause of action is without the "express statutory sanction" of Section 301. It is therefore necessary to look to the "policy of the legislation" in order to determine the outcome of the issue at bar.

The question thus becomes what was the purpose behind enactment of Section 301, and particularly the quoted portion of Section 301(b).

The "Danbury Hatters" case, *Loewe v. Lawlor*, 208 U.S. 274 (1908), was the ontogeny of Section 301(b). In that case the company was awarded judgment against both the individual members of the union and the union itself. Because the union was insolvent, execution was made upon the personal assets of the members in satisfaction of the judgment. Referring to the end result of "Danbury Hatters," Senator Taft, one of the sponsors of the Labor-Management Relations Act, stated: "[w]e do not want to perpetrate such a condition." 92 Cong. Rec. 5705 (1946).

The Seventh Circuit squarely faced the issue at bar in *Sinclair Oil Corp. v. Oil, Chemical and Atomic Workers Int. Union*, 542 F.2d 49 (7th Cir. 1970). Basing its decision regarding the issue at hand on the inescapable conclusion

that Congress did not intend for such an action to lie as is pleaded in plaintiff's complaint.

To permit plaintiff's cause of action to stand would be allowing plaintiff to do indirectly what the Act directly forbids. More to the point, the bottom line of Section 301(b) is to insulate employees from having to be liable in damages for their unauthorized activity. It is illogical to say that under Section 301 an employer may not collect damages from an employee when the employee and the union are both defendants but may collect damages when only the employee is sued.

Plaintiff relies on two district court cases which have addressed themselves to the instant issue. *Alloy Cast Steel Co. v. United Steelworkers of America*, 429 F.Supp. 445 (N.D. Ohio 1976), and *New York State United Teachers v. Thompson*, 459 F.Supp. 677 (N.D.N.Y. 1978), hold that a damage suit may be maintained solely against individual employees under the provisions of Section 301.

The district court in *Alloy Cast Steel* based its decision for the most part on the case of *DuQuoin Packing Co. v. Meat Cutters Local P-156*, (N.D.Ill. 1971), [sic] which held individual members could be subject to a money damage claim. However, the *DuQuoin Packing* district court is within the Seventh Circuit and *Sinclair Oil* was decided nearly ten months after *DuQuoin Packing*, leaving little doubt that DuQuoin Packing has been, at least impliedly, disapproved.

Relying heavily on *Alloy Cast Steel* the district court in *New York State Teachers* also answered the issue at bar in the affirmative. It pointed out—as does the plaintiff herein—that the Supreme Court has specifically reserved this question. See, *Smith v. Evening News Assoc.*, 371 U.S. 195, 199-200 (1962). While this is true, that fact could hardly be used as precedent to support plaintiff's argument.

The germane portions of the legislative history of Section 301 are set forth in both *Textile Workers* and *Sinclair Oil*.

From a plain reading of those portions, it is abundantly clear that the aim of Congress was to prevent another "Danbury Hatters" from occurring.

This Court's decision that this action may not be maintained against the defendants individually does not leave the plaintiff—or any other employer—without a remedy for any wrong suffered by reason of wildcat strikes. The remedy so afforded is that of the right to discharge a culpable employee.

> "But there is another more formidable argument against individual liability apart from congressional intent in relations [sic] to section 301. Sections 7 and 8 regulate wildcat strikes on the assumption that the severest penalty inflicted upon an unprotected employee is discharge. Since the question of whether an employee may be discharged or replaced is central to the scheme of protected and unprotected activity, a damage suit against workers would be inconsistent with federal law because the Act assumes that discharge is the ultimate penalty.[2]

In view of the foregoing, the stated issue is answered in the negative.

Judgement in accordance with this opinion will be entered.

DATED: March 9, 1979
DENNIS R. KNAPP, Chief
United States District Judge

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[2]Gould, "The Status of Unauthorized and 'Wildcat' Strikes Under the National Labor Relations Act," 52 Cornell L. Rev. 672, 704 (1967).

# APPENDIX D

## SUBCHAPTER IV—LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

### §185. Suits by and against labor organizations

#### Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisidiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

#### Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgements

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

#### Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

**Service of process**

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capactiy as such, shall constitute service upon the labor organization.

**Determination of question of agency**

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.

No. 80-985

IN THE

SUPREME COURT

OF THE UNITED STATES

October Term, 1980

PUTNAM FABRICATING COMPANY
(a division of Union Boiler
Company), a corporation,

Petitioner,

vs.

ROGER NULL, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

# BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Does § 301(a) of the Act[1/] create federal subject matter jurisdiction for a claim of damages brought by an employer against individual employees who have already been discharged for engaging in a wildcat strike when: (1) § 301(a) does not expressly provide federal jurisdiction for such claims and (2) a personal judgment would expose the assets of the employees to execution contrary to the "Danbury Hatters" policy of § 301(b)?

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1/ Labor Management Relations Act of 1947, 29 U.S.C.A. 185(a).

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No. 80-985

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

PUTNAM FABRICATING COMPANY
(a division of Union Boiler
Company), a corporation,

Petitioner,

v.

ROGER NULL, et al.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

# BRIEF IN OPPOSITION

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## ADDITION TO STATEMENT OF THE CASE

In addition to the matters set forth by Employer[2/] in its Statement

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[2/] The Respondents will at times be referred to as "the Employees" and the Petitioner will at times be referred to as the "Employer". The Petition will be referenced as "Pet. __".

This Brief in Opposition is submitted only by some of the named

of Facts, it should be noted that upon issuance and service of the Boys Markets injunction requested by the Employer the picketing effectively ended.[3/]

REASONS FOR DENYING THE PETITION

1. The facts of this record are distinguishable from those of Complete Auto Transit.

In the present case, unlike Complete Auto Transit, Inc. v. Reis,

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2/(cont'd)
Respondents: Larry Moore, Joseph Cox, Larry Beller, Earl Cunningham, Robert Cook, Russell Spaulding and Aubrey Asbury.

3/ Inasmuch as the injunction contained findings concerning the existence of a strike over an arbitrable issue (see page 11 of Joint Appendix filed in the Court of Appeals (hereinafter "JA"), it was apparently issued under the authority of Boys Markets, Inc. v. Retail Clerks, Local 770, 398 U.S. 235, 254 (1970).

No. 79-1777 (October 14, 1980), a Boys Markets injunction was issued and, by the time the Employees were sued, they had been discharged. The Employer had thus reaped the full benefit of the policies underlying § 301(a) in that it had obtained the assistance of the District Court in ending the strike and had discharged the striking employees. In Reis, the employer obtained Boys Markets relief against the union and did not discharge the strike employees.

2. The decision below interpreted correctly the wording and the legislative history of §§ 301(a) and (b).

The Petition should be denied because the decision below, and the decisions of the two other Courts of

Appeals[4] are based upon a uniform and sound analysis of the wording and legislative history of Section 301. The Court of Appeals adopted the rationale of the 1971 decision of the Seventh Circuit in Sinclair, supra, that:

1. Section 301(a)[5] does not create federal subject matter jurisdiction.

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[4] Sinclair Oil Corp. v. Oil Workers International, 452 F.2d 49 (7th Cir. 1971) (hereinafter "Sinclair"); Steelworkers v. Lorain, a division of Koehring Co., ___ F.2d ___ (6th Cir. Nos. 77-1678-9, Feb. 14, 1980); and Reis, supra, 614 F.2d 1110 (6th Cir. 1980).

[5] Suits by and against labor organizations.
(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

2. Even if, arguendo, § 301(a) did create federal jurisdiction for such damage claims against the individual workers, the Danbury Hatters Policy of § 301(b) rules out damage relief against individuals.

The Seventh Circuit said:

> Section 301 does not expressly authorize suits between an employee union member and his employer arising from bargaining contracts. ...
>
> The "legislative history" of § 301 does not disclose a congressional purpose to authorize ... an employer suit against employee union members arising from a wildcat strike.

Id., 452 F.2d at 52.

Neither the wording of § 301(a) itself nor the legislative history recited by the Employer at Pet. 6-7 indicates or suggests any intent to

create federal jurisdiction for employer claims against employees in those cases where the employer does not have a claim against the union. The snatches of legislative history quoted in the Petition do not support the creation of such jurisdiction. Even though the Employer recognizes that 301 was concerned with the creation of "corporate-like" status for unions (Pet. 6), the Employer ignores the force of the unquestioned proposition that in 1947 Congress was primarily concerned with making unions effectively liable for the union wrongs. Sinclair, 452 F.2d at 52-4.

Although § 301(a) was broadly applied by this Court in Lincoln

Mills[6] and in the cases following, this Court made it clear in a wildcat strike setting that the Danbury Hatters policy of § 301(b) is to be just as broadly applied.

> The legislative history of § 301(b) makes it clear that this third clause[7] was a deeply felt congressional reaction against the Danbury Hatters clause[8] ... and an ex-pression of legislative

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[6] Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

[7] The clause, exempting agents and members from personal liability for judgments against unions even when the union is without assets, is quoted at footnote 10, infra.

[8] Loewe v. Lawlor, 208 U.S. 274 (1908); Lawlor v. Loewe, 235 U.S. 522 (1915); Loewe v. Savings Bank of Danbury, 236 F.2d 444 (2d Cir. 1916), all of which are summarized in Atkinson, 370 U.S. at 248.

> determination that the aftermath ... of that decision in which many members lost their homes was not to be permitted to recur.

Atkinson v. Sinclair Refining Co., 370 U.S. 238, 248 (1972) (hereinafter "Atkinson").

> ... Consequently, in discharging the duty Congress imposed upon us to formulate the federal law to govern § 301(a) suits, we are strongly guided by and do not give a niggardly reading to § 301(b). 'We would undercut the act and feed its policy if we read § 301 narrowly.' (Lincoln Mills, 353 U.S. at 456 (1957)

Id. at 248-49. The citation of Lincoln Mills as authority for a broad reading of § 301(b) completely undermines the cornerstone of the Employer's argument that Lincoln Mills is authority for creating the damage remedy against individuals by the process of "judicial inventiveness". See Pet. at 8.

Employer forgets that, notwithstanding Lincoln Mills,[9] § 301(a) creates federal subject matter jurisdiction. Unless such jurisdiction is created, it does not exist. The Court of Appeals did not take away something from the Employer; it simply held that the Employer never had any federal jurisdiction to begin with. Section 301(a) simply does not create the jurisdiction the Employer would have it create.

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[9] The federal policy favoring arbitration, for example, has justified expansive interpretations of 301(a) jurisdiction in the Steelworkers Trilogy (Steelworkers v. American Mfg. Co., 363 U.S. 564; Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574; Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960)); and Boys Markets, supra, 398 U.S. at 242, 252-3, and Sinclair, 452 F.2d at 54 n. 10. That policy, and other federal labor policies discussed at pp. 15-17,

Even if the snatches of legislative history relied upon by the Employer did, arguendo, create some doubts as to the scope of § 301(a) jurisdiction, such doubts are readily put to rest by the Danbury Hatters policy reflected in the third clause of § 301(b).[10]

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9/(cont'd) infra, are not involved in this case. Any question of jurisdiction of the District Court to issue the Boys Markets injunction against individuals was not appealed and is not present herein. However, it certainly could be argued that injunctive jurisdiction against individuals exists in view of the remedial purposes of Boys Markets and the avoidance of "industrial strife". Id., 248 U.S. at 249, cited in Sinclair, 452 F.2d at 54. See Comment, 86 Harv.L.Rev. 447, 458 (1972).

10/ That clause states:

> Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual members of his assets.

The concern of Congress -- employees "los[ing] their homes"[11/] in the aftermath of litigation against employees for peaceful collective activity -- is the same in this case or in Danbury Hatters. Typically, the assets of workers in traditional terms of real and personal property, are limited. Usually, the home of a worker is his most substantial and easily levied upon asset. His income, the wages from his labors, are by far his most important resource. A judgment for even the relatively modest losses alleged by the Employer[12/]

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[11/] Atkinson, 370 U.S. at 248; Sinclair, 452 F.2d at 52; Comment, 86 Harv.L.Rev. 447, 452 (1972).

[12/] The Employer submitted an affidavit that its damages were $13,056.94 (JA 77).

could have disastrous consequences on the individual Respondents herein, each of whom would be jointly liable. Congress was clearly concerned with the social welfare implications of employees and their families being thrown out of their houses on account of "non tortious unprotected concerted activity". Sinclair, 452 F.2d at 54. That directive applies to the facts herein as it did to Danbury Hatters.

3. The decision below serves the federal policies of avoidance of industrial strife by minimizing involvement of the federal courts in nonproductive or counterproductive labor litigation, and carries out the essentially remedial purposes of the Act.

Any judgment -- no matter how disastrous the effects of levy and execution on the individual worker might be -- would in the end be difficult to effectively collect. Professor Gould concluded that compensation to the Employer would not be the motivation for damage suits against individual workers for peaceful collective activity.

> A damage suit would not be aimed at compensation for losses, which is normally the motive for § 301 suits. Employees, unlike the union, could not possibly have the resources to compensate the employer. The suit's motivation would, therefore, be that of a deterrent ...

Gould, "The Status of Unauthorized and 'Wildcat' Strikes Under the National Labor Relations Act," 52 Cornell L.Q. 672, 703-4 (1967); see Comment, 86 Harv.L.Rev. 447, 451.

The attempts of the employer to create federal subject matter jurisdiction must also be examined in light of §§ 7 and 8 of the Act, 29 U.S.C. 157 and 158.

> Section 7 and 8 regulate wildcat strikes on the assumption that the severest penalty inflicted on an unprotected employee is discharge. Since the question of whether an employee may be discharged or replaced is central to the scheme of protected and unprotected activity, a damage suit against workers would be inconsistent with federal law because the act assumes that discharge is the ultimate penalty. Damages would constitute an attempt to duplicate the federal scheme of penalties for wildcat strikers.

Gould, supra at 13, p. 703-4; Comment, 86 Harv.L.Rev. 447, 453-4, 458. The remedy of discharge free of the powers of the NLRB to order reinstatement in the enforcement of §§ 7 and 8, especially when considered in light of

the reality that the income of a worker from his job is normally his most valuable financial resource, is, indeed, a formidable weapon.

Damage suits against individual employees would involve the federal judiciary in the "industrial strife" this Court sought to avoid Boys Markets.

> Neither the threat nor the prosecution of a damage suit will often provide the employer with an effective means of ending the work stoppage. Industrial peace requires labor-management cooperation; but a damage suit is likely to produce only animosity, hampering future bargaining and creating an atmosphere not readily conducive to reasoned negotiation. Furthermore, a wildcat strike will often be the product of emotional ferment over an immediate issue. In such a situation, the average worker may be neither informed about the possibility of a damage suit nor intimidated by an employer's threat to bring such a suit. Thus, the availability of a damage remedy would not necessarily bring about a quick return to work.

Comment, 86 Harv.L.Rev. 447, 451-2 (1972).

Individual liability for damages would be double punishment. The consequences of discharge include immediate loss of income, difficulty in obtaining a new job and the stigma of having lost a job. Congress decided in § 301(b) that a second wave of consequences including the "fiscal ruin" of workers being thrown out of their houses and the seizure of their bank accounts and earnings -- was not to be "visited" upon workers. Sinclair, 452 F.2d at 52.

Punishment beyond discipline or discharge would also be contrary to the "'essentially remedial' objectives of the national labor relations act." IBEW v. Foust, 442 U.S. 42, 52 (1979). In view of the reality that most judg-

ments like the one sought by this Employer cannot be enforced and that the litigation itself would not be economical from the plaintiff's point of view, one can only conclude that the motivation for these suits may not be economic recovery but may be harrassment and further punishment of wildcatting employees -- contrary to "general labor policy [which] disfavors punishment ...". Foust, Id.

The availability of a new remedy against individuals could well undermine "the effectiveness of unions as collective bargaining agents."[13/]

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13/ Although IBEW v. Foust, 99 Sup.Ct. 2121, 2126 (1979), involved a different question, its underlying concern of protecting the role of the union applies to this setting.

For example, adoption of the Petitioner's position would create two alternatives for employers about to file § 301 actions. One, the employer could choose whether or not to sue the union or the employees. The employer, in the interest of not undermining its long term dealings with the union, may selectively sue some or all of the striking employees, instead of the union. The second alternative of the employer would be a multi-count 301 suit[14] in which the

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[14] The format for this sort of suit is illustrated in Atkinson, 370 U.S. 239-40, 245, 249 n. 7 and Sinclair, 452 F.2d at 51. Although such complaints are at times filed, presently the claims against the individual employees

employer sues the union and, in the event it is not able to prove the liability of the union within the principles set forth in Carbon Fuel Co. v. United Mine Workers, 444 U.S. 211, 218 (1979), proceeds against the individual employees. The simultaneous or consecutive trials of the separate claims could hardly serve the policy of avoiding "industrial strife" but would "embroil" the federal judiciary in a new type of litigation.[15] Indeed,

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14/(cont'd)
rarely proceed to trial presumably due to the rulings of the Courts of Appeals.

15/ In Buffalo Forge Co. v. Steelworkers, 428 U.S. 297, 410 n. 12 (1976), the Court expressed concern about the range of litigation which could result if it had expanded the Boys Markets doctrine. The issue of arbitrability involved in Buffalo Forge only arises in some strikes. By contrast, the issue of whether the union or the employees were responsible for a wildcat strike is inherent in nearly every § 301(a) suit brought to collect damages

careful employer counsel could feel obliged to sue individual employees in the interest of avoiding the perils of res judicata if there were any doubt about the evidence of union responsibility required by Carbon Fuel.

The circumstance that 301(b) does not expressly rule out damage claims against striking employees does not mean that such claims exist. As was noted in Sinclair, the drawing of such a negative inference is illogical:

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15/(cont'd)

for "wildcat" strikes.

> We do not see how, in view of sub-paragraph (b) and the "Danbury Hatters" notion ... an implication can reasonably arise from the terms of § 301 that Sinclair may recover damage against the individual defendants.

452 F.2d at 52. Congress, having declined to create such jurisdiction in § 301(a),[16] made it doubly clear in § 301(b) that jurisdiction over damage claims did not exist.

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[16] The argument at Pet. 8, that Smith v. Evening News Association, 371 U.S. 195 (1962), and Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976), somehow provide a basis for expanding 301 jurisdiction to include its claim is mistaken for several reasons. It ignores the directive of Atkinson that the "Danbury Hatters" policy of § 301(b) is to be applied broadly. See p. 8 above. Smith involved a claim by employees for wages wrongfully withheld on account of an apparently admitted discriminatory denial of work and was essentially a claim for past due wages based on a collective bargaining agreement. The wage claim could be enforced either by

16/(cont'd)
the union or by the individual. The question decided was whether any court had jurisdiction to hear the case, or whether it was preempted by the exclusive jurisdiction of the NLRB. See 371 U.S. at 197-201. Smith simply did not involve the boundaries of § 301(a) now in question.

The coincidence that Smith allowed a wage claim by an individual and that this case involves a claim against individuals provides no basis for creating 301 jurisdiction in the wildcat strike setting herein. Apparently, Hines is cited merely as authority because it repeats the statement made in Smith that 301 contemplates unspecified suits by and against individual employees.

New York State United Teachers v. Thompson, 459 F.Supp. 677 (N.D. NY 1978), may illustrate the type of unspecified cases alluded to by Smith and Hines. The employer in Thompson asserted a restitution type of claim against two professional employees, for a proportionate rebate of salary and travel expenses advanced to the employees so that they could take extended educational leaves. A collective bargaining agreement expressly provided for such a rebate. The District Court emphasized that the employer could not assert its claim for restitution in the grievance procedure established by the collective agreement (459 F.Supp.

## CONCLUSION

For the reasons stated above, the Court should deny the Petition.

Respectfully submitted,

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16/(cont'd) at 682) and "the usual employer remedies of discipline and discharge [were] non-existent". 459 F.Supp. at 683. Thompson did not involve the Danbury Hatters policy of § 301(b), and, by contrast, seemed to the district court to be the kind of case -- unique as it was -- which fit within § 301(a). See 459 F.Supp. at 682, 684.